MOHD KUSAINI MAHMUD v. PP

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
[CRIMINAL APPEAL NO: B-05-47-02-2013]
15 MARCH 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 808.2g of cannabis – Appeal against conviction and sentence – Whether there was evidence of overt act of trafficking or affirmative evidence of trafficking – Whether a case of passive possession – Whether act of keeping or concealing drugs sufficient to constitute offence of trafficking – Whether conviction and sentence safe*

EVIDENCE: *Expert evidence – Chemist report – Whether trial judge erred in converting chemist report to written statement under s. 402B of Criminal Procedure Code (CPC) – Whether chemist report could be equated with written statement as envisaged under s. 402B of CPC – Whether there was admissible evidence of weight of cannabis – Whether conviction and sentence ought to be set aside*

PW1 led a police party to raid an apartment ('the said apartment'). Upon arrival, the door of the said apartment was opened by PW5. While PW5 was being searched, the appellant came out of his room. A search was then made of the appellant's room. PW1 found three items under the mattress of the appellant's room, *to wit*, (i) a plastic bag containing six small plastic packets of suspected cannabis; (ii) a plastic packet containing 36 plastic packets of suspected cannabis; and (iii) a yellow plastic bag containing two slabs of suspected cannabis. The three items were seized by PW1 and the appellant was arrested. Upon analysis, the chemist ('PW7') confirmed that the items seized were cannabis ('the said drugs') with a total weight of 808.2g. The appellant was then charged under s. 39B(1) of the Dangerous Drugs Act 1952 ('DDA'). The trial judge found that the prosecution had proven its case beyond a reasonable doubt and accordingly convicted and sentenced the appellant to death. Aggrieved, the appellant appealed. On appeal, the appellant submitted, *inter alia*, that the trial judge had erred in converting PW7's chemist report to a written statement under s. 402B of the Criminal Procedure Code ('CPC'). The appellant contended that a chemist report was not a written statement as envisaged under s. 402B of the CPC. As such, there was no oral evidence or proof as to the weight of the drugs. Therefore, the appellant argued that on this ground alone, the appellant's conviction and sentence ought to be set aside.

Held (allowing appeal; setting aside order of High Court and substituting with a conviction under s. 6 of the DDA; sentencing appellant to 18 years imprisonment and ten strokes of whipping)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) Section 399(1) of the CPC refers to any document purporting to be a report under the hand of any persons mentioned in sub-s. (2) upon any persons, matter or thing examined or analysed by him that may be given in evidence in any inquiry or trial. Section 402B of the CPC refers to a written statement by any person and such statement shall with the consent of the parties in the criminal proceedings, be admissible as evidence to the like intent as oral evidence to the like effect of that person, subject to the conditions provided in sub-s.(2). The functionality of the two provisions are poles apart and each stands on its own. Each is to be applied in different situation with varying legal conditions and implications for its compliance or non-compliance. Converting the former into the latter would run counter of its expressed provisions. It was improper for the trial judge to convert PW7's chemist report into his written statement under s. 402B of the CPC. Therefore, there was no evidence given by any witness as to the weight of the said drugs, which must necessarily come from the oral testimony of the chemist, PW7. (paras 33, 34, 35)

(2) Passive possession is a recognised defence to trafficking in spite of the invocation of the trafficking presumption under s. 37(da) of the DDA. There was no evidence of overt act of trafficking or affirmative evidence of trafficking. Further, the amount of drugs *ie*, 808.2g was only four times above the statutory limit. It was not a large amount where it could be inferred that the appellant was keeping or concealing the drugs for the purpose of trafficking in them. In all the circumstances of the case, the prosecution had managed to prove a mere act of the appellant 'keeping' or 'concealing' the said drugs without more. The mere act of keeping or concealing the drugs is not sufficient to constitute the offence of trafficking. (paras 42-47)

Bahasa Malaysia *Headnotes*

PW1 mengetuai sepasukan polis menyerbu sebuah apartmen ('apartmen tersebut'). Apabila tiba di situ, pintu apartmen tersebut dibuka oleh PW5. Semasa PW5 sedang diperiksa, perayu keluar dari biliknya. Penggeledahan kemudian dijalankan terhadap bilik perayu. PW1 mendapati tiga bahan di bawah tilam di bilik perayu, iaitu (i) satu beg plastik mengandungi enam paket kecil plastik disyaki ganja; (ii) satu paket plastik mengandungi 36 paket plastik disyaki ganja; dan (iii) satu beg plastik kuning mengandungi dua mampatan disyaki ganja. Ketiga-tiga bahan tersebut dirampas oleh PW1 dan perayu ditangkap. Setelah analisis, ahli kimia ('PW7') mengesahkan bahawa bahan dirampas adalah ganja ('dadah tersebut') dengan jumlah berat 808.2g. Perayu kemudian disabitkan di bawah s. 39B(1) Akta Dadah Berbahaya 1952

('ADB'). Hakim bicara mendapati pihak pendakwaan berjaya membuktikan kes melampaui keraguan munasabah dan dengan itu, mensabitkan dan menjatuhkan hukuman mati terhadap perayu. Terkilan, perayu merayu. Atas rayuan, perayu menghujahkan, antara lain, bahawa hakim perbicaraan terkhilaf dalam menukar laporan kimia PW7 kepada satu kenyataan bertulis di bawah s. 402B Kanun Tatacara Jenayah ('KTJ'). Perayu menyangkal bahawa laporan kimia bukan kenyataan bertulis seperti yang termaktub di bawah s. 402B KTJ. Oleh itu, tidak ada keterangan lisan atau bukti tentang berat dadah. Oleh itu, perayu menghujahkan bahawa atas alasan ini sahaja, sabitan dan hukuman perayu harus diketepikan.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi dan menggantikannya dengan sabitan di bawah s. 6 ADB; menjatuhkan hukumah 18 tahun penjara dan sepuluh sebatan terhadap perayu)

Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 399(1) KTJ merujuk kepada mana-mana dokumen yang dikatakan laporan yang disediakan oleh seseorang yang disebut dalam sub-s. (2) terhadap seseorang, sesuatu perkara atau benda diperiksa atau dianalisis olehnya yang boleh diberikan sebagai keterangan dalam apa-apa siasatan atau perbicaraan. Seksyen 402B KTJ merujuk kepada kenyataan bertulis oleh mana-mana orang dan pernyataan sedemikian hendaklah dengan persetujuan pihak-pihak dalam prosiding jenayah itu, boleh diterima sebagai keterangan untuk niat yang sama seperti keterangan lisan yang memberi kesan sama terhadap orang tersebut, tertakluk kepada syarat-syarat yang diperuntukkan dalam sub-s. (2). Fungsi kedua-dua peruntukan adalah berbeza dan setiap satu berdiri sendiri. Setiap satu digunakan dalam keadaan berbeza dengan pelbagai keadaan dan implikasi undang-undang bagi pematuhan atau ketidakpatuhan. Menukar salah satu antaranya akan bertentangan dengan peruntukan nyata. Tidak wajar bagi hakim bicara menukar laporan kimia PW7 kepada kenyataan bertulis di bawah s. 402B KTJ. Oleh itu, tiada keterangan diberikan oleh mana-mana saksi untuk berat dadah tersebut, yang sepatutnya diperolehi daripada testimoni lisan ahli kimia, PW7.

(2) Milikan pasif adalah pembelaan yang diiktiraf bagi pengedaran walaupun terdapat pemakaian anggapan pengedaran di bawah s. 37(da) ADB. Tiada keterangan tindakan pengedaran secara terang-terangan atau keterangan afirmatif pengedaran. Malah berat dadah iaitu 808.2g hanya empat kali melebihi had berkanun. Ia bukan jumlah besar di mana ia boleh disimpulkan bahawa perayu menyimpan atau menyembunyikan dadah bagi tujuan pengedaran. Dalam semua hal keadaan kes, pihak pendakwaan berjaya membuktikan tindakan perayu menyimpan atau 'menyembunyikan' dadah semata-mata tanpa melebihi had. Menyimpan atau menyembunyikan dadah sahaja tidak mencukupi untuk membentuk kesalahan pengedaran.

Case(s) referred to:
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
Mohamad Fauzi Ridzwan & Anor v. PP [2006] 1 CLJ 478 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP lwn. Haling Arala Jimjani [2008] 4 CLJ 163 CA ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 399(1), 402B
Dangerous Drugs Act 1952, ss. 2, 6, 37(da), 39A(2), 39B(1), (2)

For the appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Nurshafini; DPP

[Editor's note: For the High Court judgment, please see Mohd Kusaini Mahmud v. PP [2013] 1 LNS 88 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Ahmadi Asnawi JCA:

[1] The appellant was charged with the following offence before the High Court at Shah Alam:

> Bahawa kamu pada 9 Ogos 2010 jam lebih kurang 4.00 pagi, di alamat No. S2-1-03A, Lorong Berembang Samudera 2, Apartment Taman Sri Berembang, Pelabuhan Klang, di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya jenis cannabis seberat 808.2 gram dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1), Akta Dadah Berbahaya, 1952, dan boleh dihukum di bawah s. 39B(2), Akta yang sama.

[2] At the conclusion of the trial, the appellant was found guilty and convicted of the offence and sentenced to suffer the death penalty.

[3] The appeal before us was in respect of the said conviction and sentence.

[4] We allowed the appeal after due consideration of the issues raised and the submissions articulated by the parties in support thereof and upon scrutiny of the entire record of appeal filed herein. We set aside the conviction under s. 39B(1) of the Dangerous Drugs Act 1952 (herein after referred as 'the DDA 1952') and the sentence handed down by the High Court under s. 39B(2) of the same and substituted it with a conviction under s. 6 of the DDA 1952, and sentenced him to 18 years imprisonment under s. 39A(2) of the same. We now give our grounds.

The Case For The Prosecution

[5] The prosecution's case was anchored upon the evidence of PW1 (Insp. Azhar bin Ali) who led a police party to raid the aforesaid apartment looking for a suspect involved in a house breaking offence. He had received information that the wanted man was staying at the said apartment.

[6] Upon arrival at the apartment and on shaking the grill door when there was no response from the occupant(s), PW1 directed the lock on the grill door to be cut open. While cutting the said lock, the wooden door after the grill door was opened by PW5 (Mohd Hafiz bin Mohd Dom), an occupier of the said apartment.

[7] PW1 and his men then entered the apartment. PW5 was searched at the living area and no incriminating item was found on his person.

[8] While PW5 was being searched, the appellant came out of his room. A body search was done on him. Nothing incriminating was found. A search was then made of his room.

[9] PW1 found three items under the mattress, *to wit*, a plastic bag with the words 'Refer' imprinted on it, containing six small plastic packets of suspected cannabis, a plastic packet imprinted with the words 'Alicafe Power Root' containing 36 plastic packets believed to be cannabis and a yellow plastic bag written 'Terima Kasih' from inside a bag labelled 'Adidas' in which there were two slabs, also suspected to be cannabis.

[10] The three items were seized by PW1 and the appellant was arrested.

[11] PW1 then proceeded to another room in the house and found PW4 (Ahmad Azizi bin Mulot) in the room. Nothing incriminating was found in his room or on his person.

[12] The appellant and the items suspected to be cannabis were handed to the investigating officer, PW8 (Insp Suziana binti Zamli) by PW1.

[13] PW8 then sent the suspected items to the Chemistry Department for analysis. The chemist, PW7 (Zulkefli bin Mohd Edin), confirmed that the items seized were cannabis (hereinafter referred to as 'the said drugs') as defined under the DDA 1952 with a total weight of 808.2g. His report is exh. P-16 at pp. 395, 996 of Rekod Rayuan (RR) Jilid 4.

Findings Of The Learned Judge At The End Of The Prosecution's Case

[14] The learned judge at p. 353, RR Jilid 4, found:

> From the facts it was clear that at all material times the room was occupied by the accused alone and therefore any items found in the room belonged solely to him. The place where the drugs were found under the mattress and the room being small room, there was no way the accused could have missed seeing the drugs. From the place where the drugs were found, a reasonable inference could be drawn that the accused had knowledge of the drugs. In other words the accused was in possession of the drugs in the room.

[15] At p. 356 of the same Jilid, the learned judge also found:

> The manner the drugs were packaged in small packages could further raise a reasonable inference that the drugs were meant to be sold besides that the large amount of drugs found also raised the presumption of trafficking under the Dangerous Drugs Act, 1952.

[16] Being satisfied that the prosecution had proven a *prima facie* case against the appellant, the learned judge ordered the appellant to enter his defence.

[17] We were entirely with him in respect of the said findings.

The Appellant's Defence

[18] The appellant gave evidence on oath.

[19] The appellant posited that at the time of the police raid, he was sleeping in his room. He woke up on account of the commotion. He was immediately detained by the police when he came out of the room. He was directed to squat at the living room together with PW5. The police then searched the entire house and the rooms simultaneously.

[20] Soon after he saw two or three policemen emerging from his room carrying a bag and several plastic packets.

[21] He was immediately handcuffed and taken to the police station together with PW5 and PW4.

[22] The gist of the appellant's defence was that he had no knowledge of the drugs. He raised two possibilities of how the drugs could be in the room. Firstly, he shared the room with his friend, Aizad, a married man who stayed with his wife in a house nearby. Aizad often squatted in his room.

[23] Secondly, he always left his room unlocked and his two housemates often came into his room to chit chat and was not barred from entering his room. His two housemates had full access into his room.

[24] The learned judge rejected the appellant's defence. At p. 357, Jilid 4, the learned judge found:

> I did not believe the testimony of the accused on both possibilities, Although the accused had mentioned the name of his friend to the investigating officer, according to the investigating officer the accused could not give further personal details of the friend nor show him the house of the friend. It is clear that the failure of the accused to give further details of the friend showed that the friend either did not exist and even if existed, had nothing to do with the drugs in the room. It was also illogical for the friend to squat with him when he had a house nearby. If the accused knew his friend's house, he could have always showed the police the house or at least indicate the area where the house was situated.
>
> Further according to the accused, he had known this friend 'Aizat' for a period of 10 years surely he has enough knowledge of the whereabouts of his person to call him to court especially when he is facing such a

serious charge. Although the accused did not bear any burden to prove his defence, surely his non-calling of this friend went against him. In the case of *Baharom v. PP* (1960) 1 MLJ 249, it was observed as follows:

> It was for the defence to call such of these witnesses as they saw fit and if they do not do so, that was a fair subject of comment.

[25] The learned judge found that the appellant had failed to raise any reasonable doubt against the prosecution's case and had equally failed to rebut the presumption of trafficking invoked against him. He found that the prosecution had proven its case beyond a reasonable doubt. The appellant was thus found guilty and convicted of the charge proffered against him and sentenced to suffer death by hanging.

The Appeal Before Us

[26] Learned counsel for the appellant submitted two broad grounds of appeal, namely:

(i) that there is no admissible evidence as to the weight of the cannabis; and

(ii) alternatively, at its highest, it is a case of possession and not of trafficking.

Our Decision

[27] Learned counsel submitted that nowhere in his oral evidence that the chemist, PW7, did mention the nett weight of the cannabis which the appellant was charged.

[28] What the learned judge did was to convert PW7's chemist report (exh. P16) as a written statement under s. 402B of the Criminal Procedure Code ('CPC'), as seen at p. 176, Jilid 2, RR.

[29] Learned counsel further submitted that the approach of the learned judge was erroneous and that a chemist report is certainly not a written statement envisaged under s. 402B of the CPC. A chemist report can never be equated with a written statement. As such there is no oral evidence or proof as to the weight of the cannabis. Learned counsel added that the chemist report cannot supplement the omission of the oral evidence as the oral evidence is the substantive evidence (*Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273; *Francis Antonysamy v. PP* [2005] 2 CLJ 481; [2005] 2 AMR 750).

[30] It was finally submitted that on this ground alone, the appellant's conviction and sentence ought to be set aside and the appellant be acquitted and discharged.

[31] We were in agreement with learned counsel that PW7's chemist report under s. 399(1) of the CPC is not and cannot be equated with a written statement as envisaged under s. 402B of the Code. Hence it is wrong for the learned judge to convert the same into a written statement under the latter provision of the law.

[32] In common parlance, as defined in *Concise Oxford English Dictionary*, 12th edn, the word 'report' amongst others, carries the meaning: give a spoken or written account of something; make a formal complaint or statement about; an account given of a matter after investigation or consideration; a detail formal account of a case heard in court; a piece of information about an event or information. On the other hand 'statement' means amongst others, a definite or clear expression of something in speech or writing; a formal account of facts or events, especially one given to the police or court. It is obvious that the meaning and purport of the two words are different and applicable in different situations.

[33] Section 399(1) of the CPC refers to any document purporting to be a report under the hand of any persons mentioned in sub-s. (2) (and this includes chemists in the employment of any Government in Malaysia) upon any persons, matter or thing examined or analysed by him that may be given in evidence in any inquiry or trial; whereas s. 402B of the same refers to a written statement by any person and such statement shall with the consent of the parties in the criminal proceedings, be admissible as evidence to the like intent as oral evidence to the like effect of that person, subject to the conditions provided in sub-s. (2).

[34] It is apparent that the functionality of the two provisions are poles apart and each stands on its own. Each is to be applied in different situation with varying legal conditions and implications for its compliance or non-compliance. Converting the former into the latter would obviously run counter of its expressed provisions. It is most improper for the learned judge to convert PW7's chemist report into his written statement under s. 402B of the CPC.

[35] Hence, the concurrent issue is whether as submitted by learned counsel, that there is no evidence given by any witness as to the weight of the said cannabis, which must necessarily come from the oral testimony of the chemist, PW7, remains valid.

[36] The circumstances leading to the conversion of PW7's chemist report into his written statement is as seen in the transcript reproduced below (pp. 176 to 188, Jilid 2, RR):

> Zul : Yang Arif, saya mula menjalankan analisa pada 24.9.2010 di mana saya telah membuat penimbangan menggunakan alat penimbang elektronik yang telah dikalibrasi bagi mendapatkan berat bersih ketulan-ketulan mampat.
>
> YA : I think kalau kita guna amendment baru 402B, I think dibenarkan untuk statement ini dianggap sebagai statement dia - laporan itu dianggap sebagai statement.
>
> Zul : **Kita tender laporan?**
>
> YA : **Tender saja laporan because kita gunakan provision yang terbaharu - seksyen 402B** (emphasis added).

DPP : Jadi Yang Arif, perlukah saksi jelaskan semua ujian dia secara itu?

YA : Semua ada dalam - dalam itu ada bukan?

...

...

DPP : Cuma, Yang Arif, kalau dilihat pada laporan kimia - tidak ada analisa yang dibuat - mengenai - tidak menyatakan ujian-ujian fizikal - ujian mikroskopik - Cuma ada hasilnya - hasil ujian itu.

YA : Hasil ujian itu?

DPP : Ya. Jadi?....

YA : **Okey, analisa, okey. In that case, analisa you boleh tanya, hasil you boleh tender terus. Okey** (emphasis added).

DPP : Ya.

...

...

DPP : Ya, boleh En. Zul boleh jelaskan? ...

YA : Yang alat timbang ini semua - sudah ada dalam laporan, tidak payah.

DPP : Tidak payah, Yang Arif, berat bersih semua sudah ada.

YA : Okey, then just go direct - what is the analysis he did?

...

...

DPP : **Baiklah, keputusan atau hasil daripada keempat-empat ujian itu ada En. Zul nyatakan di mana-mana?**

Zul : **Ya, Yang Arif. Saya ada nyatakan dalam laporan kimia yang saya telah disediakan yang bertarikh 22.10.2010 dengan nombor makmal PJFOR9910/10-0** (emphasis added).

DPP : Kalau saya tunjukkan laporan kimia tersebut boleh camkan?

Zul : Boleh, Yang Arif.

...

...

DPP : **En. Zul tengok laporan tersebut. Itu adalah hasil-hasil daripada ujian yang dilakukan terhadap semua barang kes?** (emphasis added).

Zul : Ya, Yang Arif.

DPP : Yang Arif, saya pohon tandakan.

YA : P16(00:21:55).

[37] It is apparent that both the learned Deputy Public Prosecutor ('DPP') and PW7 were prevented by the learned judge from disclosing the results ('hasil') of the analysis carried out by PW7. Be that as it may, in any event both the learned judge and PW7 had alluded to the results of PW7's analysis as indicated in the chemist report (exh. P16) which stated that the weight of the cannabis is 808.2g.

[38] Hence, in our view it is not quite correct to surmise that there is no oral evidence or proof as to the weight of the said cannabis on account that in his oral testimony, PW7 had alluded to the weight of the cannabis as found in his chemist report when he was questioned by the learned DPP, indicated in the transcript enumerated above. It is otherwise had PW7 did not testify at all or did not make any reference at all to the results of his analysis as evinced in his chemist report, exh. P16.

[39] In reply to learned counsel's submissions, the learned DPP brought our attention to the document bearing the title "Persetujuan Bertulis (s. 172A(5) KTJ)" at pp. 362 to 365 of Jilid 2, RR, where the appellant, his learned counsel and the learned DPP had entered into an agreement on several issues, for the expeditious disposal of the case. In para. 2 under the caption of "Narrowing the issues of contention", at p. 363, under the column "Dokumen yang dipersetujui", one of the documents that was agreed is the Laporan Kimia (PJ) FOR 9910/10-0, exh. P16.

[40] In para. 7 under the caption of "Any other matters as may be agreed upon by the advocate representing the accused and the prosecution that may lead to the expeditious disposal of the case", the defence in sub-para. (d) had expressed "tidak bersetuju tidak akan mencabar keputusan analisa ahli kimia". The learned DPP then submitted that upon perusal of the then learned counsel's cross-examination of PW7, there was in fact no challenge mounted by learned counsel pertaining to the results of PW7's analysis of the said drugs and this must necessarily be inclusive of the weight of the cannabis.

[41] We were with him though. However, there were lingering infirmities in respect of PW7's testimony arising from the conduct of the learned judge, rendering the finding that the case against the appellant has not been proved with certainty to justify the verdict of guilty, in particular the actual weight of the cannabis.

[42] Additionally, it is common ground that passive possession is a recognised defence to trafficking in spite of the invocation of the trafficking presumption under s. 37(da) of the DDA 1952 - see *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; *Mohamad Fauzi Ridzwan & Anor v. PP* [2006] 1 CLJ 478; *PP lwn. Haling Arala Jimjani* [2008] 4 CLJ 163; *PP v. Tan Tatt Eek* [2005] 4 CLJ 460; [2005] 6 AMR 543.

[43] The evidence procured against the appellant showed that the drugs were found hidden underneath the mattress and from a bag in the appellant's room. Hence, the only evidence to fasten the appellant with trafficking in the

said drugs appears to be the appellant's act of 'keeping' or 'concealing' the said drugs in his room, one of those acts that constitutes trafficking under s. 2 of the DDA 1952.

[44] However, there was no evidence of overt act of trafficking or affirmative evidence of trafficking, a requirement established by case laws - see *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64; *PP v. Abdul Manaf Muhamad Hassan* (*supra*); *PP v. Haling Arala Jimjani* (*supra*).

[45] At the time of the police raid, the appellant was sleeping in his room. He emerged from his room upon hearing the commotion and was immediately detained. No adverse reaction or conduct on his part was detected by the police. The appellant was not in the act or in the process of dabbling in the said drugs where it could be inferred that he intends to traffic in the said drugs. Neither was the appellant in the process of carrying or transporting the drugs from one point to another where it can be inferred that he intended to distribute it.

[46] Additionally the amount of drugs (808.2g) is only four times above the statutory limit. It is not a large amount where it could be inferred that the appellant was keeping or concealing the drugs for the purpose of trafficking in them - see *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* (*supra*).

[47] In a nutshell, in all the circumstances of the case, what the prosecution has managed to prove is the mere act of the appellant 'keeping' or 'concealing' the said drugs without more. In our view the mere act of keeping or concealing the drugs in the aforesaid fashion is not sufficient to constitute the offence of trafficking. It only amounted to a case of passive possession of the said drugs.

Conclusion

[48] Henceforth, we allowed the appellant's appeal on account of the uncertainty of the weight of the cannabis (*Leong Bon Huat v. PP* [1993] 3 CLJ 603; [1993] 3 MLJ 11) and that the act of the appellant in keeping or concealing the said cannabis in all the circumstances of the case, only amounted to a case of passive possession of the same.

[49] The conviction and sentence handed down by the High Court under s. 39B(1) and 39B(2) of the DDA 1952, is set aside and substituted with one under s. 6 for possession of the drugs and punishable under s. 39A(2) of the same Act. Consequently the appellant was jailed for 18 years and given ten strokes of the rattan bearing always the gravity and rampancy of the offence committed by the appellant.